UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

JOHN G. DENTON AND PAULA J. SAVAGE,	§	
Plaintiffs,	§	
v.	§	CASE NO. 4:92-CV-164-Y
JAMES MORGAN, COMMISSIONER, JUVENILE BOARD OF COMANCHE COUNTY, TEXAS; ET AL.,	§	
Defendants.	§	

ORDER GRANTING JUDGMENT AS A MATTER OF LAW IN PART, DENYING IN PART, AND ORDERING REMITTITUR

Pending before the Court is Defendants' Second Motion for Judgment Notwithstanding the Verdict, filed on June 27, 1996. Having carefully considered the motion, Plaintiffs' response, the reply, and relevant case law, the Court will PARTIALLY GRANT the motion.

I. BACKGROUND

Plaintiffs John Denton and Paula Savage received a favorable jury verdict on which judgment was entered on June 5, 1996. The judgment was later amended on June 17. Defendants Ernie Reinke, Commissioner, Juvenile Board of Bosque County, Texas; John Weaver, Commissioner, Juvenile Board of Comanche County, Texas; and Charles Garrett, Commissioner, Juvenile Board of Hamilton County, Texas;

258

(collectively, "Defendants")[1], move the Court to set aside the jury verdict and render judgment as a matter of law in favor of Defendants.[2]

Plaintiff Denton brought a claim under the Texas Whistleblower Act and a First Amendment claim under 42 U.S.C. § 1983, the latter of which he was joined in by Savage.[3] Plaintiffs, both juvenile probation officers working in Comanche, Bosque, and Hamilton counties, alleged at trial that Defendants fired them in retaliation for writing a letter to the Texas Education Agency (the "TEA") complaining about the failure of the Clifton Independent School District ("Clifton") to provide educational services to one of Plaintiffs' clients, a juvenile denoted as "W.D.A." Plaintiffs thought that Clifton's lack of accommodation for W.D.A. was an illegal omission, and thus they reported it to the TEA, the agency they believed to have authority over the school district.

According to Plaintiffs' testimony, Defendants were so embarrassed and angered by the letter that they eventually fired the two officers. Testimony at trial showed that Defendants did indeed possess the sole power to fire Plaintiffs. The jury agreed with

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[1]The Court ruled during trial that the only defendants before the Court were the individual boards. No defendants were before the Court in their individual capacities.

[2]Though the motion is entitled "Motion for Judgment Notwithstanding the Verdict," the more correct title for the motion under amended Rule 50(b) is "Renewed Motion for Judgment as a Matter of Law."

[3]The Texas Whistleblower Act provision at issue here is found in former TEX. REV. CIV. STAT. ANN. art. 6252-16A, which was repealed in 1993 and codified at TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 1996). The act was further amended in 1995.

Plaintiffs that their terminations were in retaliation for reporting an illegality and for speaking out on a matter of public concern; and it awarded Plaintiffs damages for lost past income, future income, and pensions. Defendants move the Court to set aside the jury verdict and judgment on the ground that Plaintiffs failed, as a matter of law, to prove necessary elements of their causes of action.

II. ANALYSIS

A. Texas Whistleblower Act Claim

Defendants argue that Denton cannot maintain an action under the Texas Whistleblower Act because Denton did not report a violation which his employer, the defendant boards, committed. The Court agrees with Defendants because it became clear at trial that Clifton, and not Defendants, committed the alleged illegality which Plaintiffs reported to the TEA. The Court will therefore set aside the verdict and judgment as to the whistleblower claim on this ground alone, not reaching the other bases Defendants posit for overturning the verdict.

At the time of Denton's termination, the Whistleblower Act provided that:

> A state agency or local governmental body may not suspend or terminate the employment of, or otherwise discriminate against, a public employee who reports a violation of law to an appropriate law enforcement authority if the employee report is made in good faith.

Tex. Civ. Stat. Ann. art. 6252-16A § 2 (Vernon Supp. 1992). While the express wording of the provision does not state that the violator must be the whistleblower's employer or a fellow employee,

no court has ever interpreted it otherwise.

In Davis v. Ector County, 40 F.3d 777, 786 (5th Cir. 1994), the Fifth Circuit indicated that there are at least two requirements to make out a whistleblower claim: 1) an employer violation, and 2) a violation concerning issues in the workplace. Davis was a district attorney's office employee who wrote a letter to the county commissioner's court concerning a cover-up by the sheriff's office of his wife's sexual harassment claim against that office. The district attorney's office fired Davis after learning of the letter. Id. at 780.

The defendants argued that Davis's report detailed an illegal act committed by a non-employer agency (the sheriff's office) and, thus, did not fall within the meaning of the "in the workplace" requirement of the whistleblower provision or concern his "employer." Id. at 785-786. The Fifth Circuit rejected this argument and held that both the workplace and the employer in this case was Ector County itself, not merely the district attorney's office in which the plaintiff worked. Id. at 786. The court stated: "We conclude that Davis reported violations concerning his employer [Ector County] and addressed issues concerning his workplace [also Ector County]." Id. Thus, it appears that both requisites are necessary to the success of a whistleblower cause of action.

Denton, a juvenile probation officer, has proven that Clifton I.S.D. was one of his many "workplaces" and that the education of a juvenile concerned an issue of his workplace, but he has not shown that the alleged illegality--the clandestine report of which

in part caused his termination--was committed by his employer, the three defendant juvenile boards. There is no dispute that the Clifton I.S.D., a governmental entity legally and conceptually distinct from the county boards, committed the omission of which Denton complains. Accordingly, Denton has failed under Davis to prove the crux of a whistleblower cause of action: an employer violation.

Other courts have also implicitly required the employer (or a fellow employee) to have committed the allegedly illegal act. In Castaneda v. Texas Dep't of Agric., 831 S.W.2d 501, 503-504 (Tex. App.--Corpus Christi 1992, writ denied), the court interpreted the phrase "reports a violation of the law" to include "any disclosure of information regarding a public servant's employer tending to directly or circumstantially prove the substance of a violation of . . . law." (Emphasis added.) This exact language is quoted by the court in Texas Dep't of Human Serv. v. Hinds, 860 S.W.2d 893, 897 (Tex. App.--El Paso 1993), rev'd on other grounds, 904 S.W.2d 629 (Tex. 1995). Furthermore, the court in Stinnett v. Williamson County Sheriff's Dep't, 858 S.W.2d 573, 575 (Tex. App.--Austin 1993, writ denied) stated that, "[t]raditionally, the Whistleblower Act has been applied to public employees who are fired in retaliation for reporting their employer's violations of law that are detrimental to the public good or society in general." (Emphasis added; citations omitted.) See also Hockaday v. TDCJ, 914 F.Supp. 1439, 1443 (S.D. Tex. 1996) (quoting Stinnett).

While no case specifically holds that a plaintiff must have

alleged a violation of the law by his employer in order to maintain a whistleblower claim, the case law strongly so implies, and Denton has cited no case to the contrary. Common sense impels toward this conclusion as well. While there is a compelling rationale for protecting whistleblowing employees from retaliation by their misbehaving bosses, the rationale is not so compelling as to employees who complain about illegalities committed by persons working in or for another governmental entity. In the latter situation, the employer has a legitimate interest in disciplining employees who allege violations of the law by those with whom the employer cooperates, does business, or has an important relationship. This interest is even greater where, as here, the employee's complaint, however much in good faith, is made behind the employer's back and is erroneous.[4] This Court does not believe that public officials, like the defendant judges in this case, should be powerless against employees who make bogus (though arguably good-faith) allegations against persons with whom maintaining a good working relationship is essential to the successful performance of

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[4]TEA's written response to Plaintiffs' letter alleging that Clifton I.S.D. failed--in violation of federal law--to provide educational services to W.D.A. states:

> Documentation indicated that [Clifton] conducted an [admission, review, and dismissal (ARD)] meeting within a short time after enrollment . . . . While it is expected that special education services . . . will begin immediately . . . short delays are allowed by the federal regulations. Your allegation cannot be sustained.

(Defs.' Ex. 19.)

the officials' public duties.[5] Because plaintiff Denton has failed to prove that his allegation concerned a violation of the law by his employer, his whistleblower cause of action must fail. The judgment entered for Denton on the jury verdict under the Texas Whistleblower Act is therefore set aside, and Denton will take nothing on the claim.

B. First Amendment Claim

Defendants move for judgment notwithstanding the verdict on Plaintiffs' First Amendment claim brought under 42 U.S.C. § 1983. In their motion, Defendants do not challenge the jury's verdict per se with respect to the First Amendment claim. Rather, Defendants argue that it was error for the Court to even submit that claim to the jury in the first place. Defendants reason that, because Plaintiffs failed to adduce any evidence at trial that the three juvenile probation boards' allegedly unconstitutional act in terminating them was pursuant to any custom, policy, or practice, there can be no liability under § 1983.[6]

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[5]The 1995 amendments to the Texas Whistleblower Act, though not applicable to this case, may show that the Texas legislature sees this issue differently. The legislature amended the act to provide that a state or local governmental entity may not take adverse action against a public employee who reports "a violation of law by the employing governmental entity or another public employee." TEX. GOV'T CODE ANN. § 554.002 (Vernon Supp. 1996). (Emphasis added.)

[6]Defendants also assert that the only defendants identified as responsible parties, the individual juvenile probation boards, did not have the legal authority to hire or terminate the probation officers and therefore could not be held individually liable for Plaintiffs' terminations. Rather, they argue that the boards could only operate together as one board, the 220th Judicial District Board, which they claim is a state entity.

At trial, however, the Court ruled that the 220th Judicial

Under present § 1983 law, liability may be imposed upon governmental units for depriving individuals of constitutional rights in two ways. First, liability can be imposed upon a governmental unit for its employee's intentional acts that deprive someone of his constitutional rights so long as the act was done in accordance with that unit's policies, practices, or customs. See Monell v. Dep't of Social Services, 436 U.S. 658, 690 (1978); and see also Hart v. Walker, 720 F.2d 1443, 1445 (5th Cir. 1983). Second, a governmental unit can be held liable if one of its policy-making bodies or officials--those whose edicts or acts can fairly be said to represent official policy, or those who rank as the ultimate repository of power on the particular matter at issue--makes even a single decision that violates a person's constitutional rights. See Jett v. Dallas Indep. School Dist., 491 U.S. 701, 736-737 (1989); Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); Brown v. Bryan County, 67 F.3d 1174, 1183 (5th Cir. 1995); Hart, 720 F.2d at 1445.

Defendants argue as if a subordinate employee fired Plaintiffs and that Plaintiffs therefore had to prove that the terminations were carried out pursuant to the boards' custom, practice, or policy. Plaintiffs respond that, because no subordinate ordered

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District Board was not a legal entity for purposes of this litigation and that the boards individually would be submitted to the jury as defendants. The Court also held that the boards were creatures of county government rather than arms of the state, a ruling which finds support in the recent Fifth Circuit case of Flores v. Cameron County, Texas, No. 94-60262, 1996 WL 444267 (5th Cir. Aug. 6, 1996) (to be reported at 92 F.3d 258), and thus, sovereign immunity was not implicated.

the firings, there was no need for them to offer evidence at trial that the terminations were carried out pursuant to the boards' customs, policies, or practices. Rather, Plaintiffs argue that the boards themselves were the final policy-makers for purposes of terminating the probation officers, and therefore evidence of their decisions to terminate Plaintiffs was enough, by itself, to impose liability on the boards.

Whether the boards had final policy-making authority so that, as Plaintiffs urge, they may be held liable for these constitutional violations is a question of law to be resolved by the Court. Jett, 491 U.S. at 737; Flores v. Cameron County, No. 94-60262, 1996 WL 444267 (5th Cir. Aug. 6, 1996) (to be reported at 92 F.3d 258). From the record developed prior to trial, including the statutory authority creating and otherwise concerning the individual boards,[7] it appears to the Court that the boards did have ultimate authority to terminate Plaintiffs, and thus, their official acts of firing Plaintiffs were, as a matter of law, sufficient to impose liability upon the county juvenile boards.

Confirmation came at trial, where there was undisputed evidence that the boards were vested with the power to terminate the juvenile probation officers and that they voted unanimously to do so. No other governmental body had such authority. Thus, this Court holds that, as a matter of law, the boards were the ultimate

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[7] TEX. HUM. RES. CODE ANN. §§ 152.0241 (Bosque County), 152.0531 (Comanche County), 152.1031 (Hamilton County) (Vernon 1990 & Supp. 1996). The Court also relied upon related provisions in chapters 142 and 152 of the Texas Human Resources Code.

repository of the power to terminate Plaintiffs and, in exercising that power, they assumed liability for any attendant violation of Denton's and Savage's constitutional rights.

Defendants' objection to the Court's submission of the First Amendment claim to the jury for lack of any evidence of a policy or custom must fail. The Court DENIES Defendants' motion for judgment notwithstanding the verdict on the First Amendment claim, and the jury's verdict as to liability on that claim and the Court's judgment thereon will stand undisturbed.

C. Remittitur

Defendants move this Court to remit portions of the jury's damage awards to Savage and Denton. The Court finds that, in law, three awards are insufficiently supported by the evidence. The first is the past-lost-wages amount awarded to Denton. Plaintiffs' expert economist testified that Denton's past lost wages totaled $24,376, but the jury awarded $117,876. There was no testimony which could support such a large award. Accordingly, the Court remits the jury's award of past lost wages to Denton by $93,500.

The second award is to Denton for a lost pension. Denton's expert testified that Denton's loss was $82,620, but the jury awarded him $110,000. No evidence is in the record to support damages above the figure established by the expert witness. Accordingly, the Court will remit the lost pension award to Denton by $27,380.

Finally, there is no factually sufficient evidence for the amount of past lost wages awarded to Savage. Plaintiffs' expert

and Bosque counties a total judgment of $216,996 for past lost wages, future lost wages, and lost pension; and plaintiff Savage shall have and recover from the defendant Juvenile Boards of Comanche, Hamilton, and Bosque counties a total judgment of $11,510 for past lost wages and lost pension.

All other relief that Defendants requested in their motion which is not granted herein is DENIED.

SO ORDERED.

SIGNED September 17, 1996.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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ORIGINAL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

SEP 18 1996

JOHN G. DENTON and PAULA J. SAVAGE,	§	
Plaintiffs,	§	
v.	§	CASE NO. 4:92-CV-0164-Y
JAMES MORGAN, ET AL.,	§	
Defendants.	§	

ORDER ON ATTORNEYS' FEES

Pending before the Court are two motions for attorneys' fees, one filed by Plaintiffs' former attorney, Kenneth Byford, on June 19, 1996, and one filed by Plaintiffs on June 25, 1996. After careful consideration, the Court will MOOT Byford's motion as duplicative of Plaintiffs' and will PARTIALLY GRANT Plaintiffs' motion.

I. BYFORD'S MOTION

Kenneth Byford was Plaintiffs' first attorney in this suit, and he has requested in his motion that the Court award him attorneys' fees for the work he performed in this cause in 1993. Plaintiffs, however, have requested fees on behalf of Byford and have incorporated Byford's affidavit and billing records from his motion into their own motion for attorneys' fees, and thus, the Court holds that Byford's motion is MOOT.

257

II. PLAINTIFFS' MOTION

Plaintiffs requested in their motion that the Court award the sum of $97,824.00 for attorneys' fees and the sum of $19,433.08 for law clerk fees and costs other than court costs. The Court, however, finds an award of only $60,000 reasonable for Plaintiffs' attorneys' fees. Pursuant to Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), the Court considers various factors in determining the reasonableness of the fees requested.

The Court finds that this cause involved difficult and novel questions of law requiring the attorneys to spend significant amounts of time and labor to prosecute the suit. Additionally, the Court is cognizant of the fact that this suit against four judges was somewhat undesirable; Plaintiffs were without counsel after Byford withdrew for almost one year before the Texas Civil Rights Project picked up their case. Furthermore, the hourly fees charged by the attorneys involved do not appear unreasonable or uncustomary, and in fact, Defendants do not argue this point at all in their response to Plaintiffs' motion for fees.

Under Hensley v. Eckerhart, 461 U.S. 424 (1983), the Court must also consider the success Plaintiffs achieved at trial as a factor in the reasonableness of the award. In their motion, Plaintiffs assert that they have been successful before the Court in prosecuting their various claims, and as such, are entitled to the full amount of their attorneys' fees, as well as law clerk fees and those costs other than court costs, expended on this suit. Defendants respond that in fact, Plaintiffs only succeeded at trial

on three of their claims--Denton's Whistleblower claim, and both Denton's and Savage's First Amendment claims--and, therefore, Plaintiffs' fee award should be greatly reduced from the requested amount. The Court will examine the degree of success Plaintiffs attained and will award a sum in accordance with that success.

First, the Court will look at the number of claims involved. Over the course of this suit, Plaintiffs have filed five complaints seeking relief for actual damages and mental anguish, as well as exemplary damages, on claims brought under the Texas Whistleblower Act, the Texas Constitution, and 42 U.S.C. § 1983. By orders of January 21, 1994 and June 5, 1995, the Court dismissed Plaintiffs' Due Process claims and Savage's Whistleblower claims against all defendants. The Court also dismissed any claims against defendants Morgan, Weaver, Reinke, and Garrett in their individual capacities and disallowed mental anguish damages. Furthermore, the Court prohibited charge questions concerning exemplary damages at trial because there was legally insufficient evidence to support their submission to the jury. Finally, the Court has on this day signed an order partially granting Defendants' Motion for Judgment as a Matter of Law to the extent that the Court will set aside the jury's verdict as to Denton's Whistleblower cause of action. As a result of the foregoing, Plaintiffs ultimately succeeded on only two claims: Denton's and Savage's First Amendment causes of action.

Second, this Court must examine the nature of the relief won and determine how exceptional or limited it is. See 461 U.S. at

437. In the case at bar, Plaintiffs won approximately $360,000 from the jury for economic losses, but for lack of supporting evidence, the Court was compelled to remit approximately $130,000, or around 36 percent, of the jury's award. The Court in Hensley stated that, "[a]gain, the most critical factor is the degree of success obtained," and while the actual judgment amount Plaintiffs are now entitled to is not an insignificant sum, in relation to what the parties initially sought--including the failed prospects of mental anguish and exemplary damages--it is a limited-enough success that it will bear upon the attorneys' fees awarded. Id. at 436.

A third aspect the Court will examine in the degree-of-success determination is the degree to which the billing records are susceptible to segregation according to work on claims won and lost. Plaintiffs have failed to segregate their billings according to work done per cause of action. It appears, however, that the claims brought were all closely related, such that segregation of work on each is difficult, if not impossible. As a result, the Court cannot award a fee according to any precise formula, and in fact, the Supreme Court has stated:

> There is no precise rule or formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment.

Hensley, 461 U.S. at 436-437. Thus, taking into account the number of claims Plaintiffs won (only two) and the amount and type of damages to which they are entitled (approximately $230,000 of

economic losses only), as well as the fact that all of the initial claims were closely related such that the billing records are not really susceptible of segregation, the Court concludes that an award of $60,000 for attorney's fees is reasonable and necessary for the overall results obtained.

III. ORDER FOR RELIEF

IT IS THEREFORE ORDERED that Kenneth Byford's Motion for Attorneys' Fees (doc. #239) is hereby MOOT.

IT IF FURTHER ORDERED that Plaintiffs' Motion for Attorneys' Fees (doc. #242) is PARTIALLY GRANTED, such that Plaintiffs shall have and recover from Defendants, that is, from the Juvenile Boards of Bosque, Comanche, and Hamilton Counties, the sum of $60,000 as reasonable, necessary, and customary attorneys' fees.

All relief which Plaintiffs requested in the instant motion and which is not granted herein is DENIED.

SO ORDERED.

SIGNED September 17, 1996.

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

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CASE: 4:92-cv-00267
DOCUMENT: 958
DATE: 12/14/04
CLERK: fwo
DIVISION: 4